National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 24, 1997

TO: Louis J. D'Amico, Regional Director, Region 5

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Baltimore Newspaper Graphic Communications Union, Local No. 31 (The Baltimore Sun Company), Case 5-CB-7952

542-6750-3300, 542-7533

This case was submitted for advice as to whether the union violated Section 8(b)(1)(B) of the Act by grieving and arbitrating the issue of supervisors performance of work on bargaining unit equipment.[(1)]

FACTS

The Union has been the certified representative of the pressroom employees since 1945. The superintendent was the only exemption from the unit between 1945 and 1984 and that exemption applied only to the union-security clause of the successive collective-bargaining agreements. During negotiations for a new contract in 1984, the Employer proposed that the assistant superintendents be excluded from the unit; however, the Union rejected that proposal. After the 1984 to 1987 contract was negotiated the Employer again attempted to get the Union to agree to exclude the assistant superintendents from the unit. On December 7, 1989, a decision and order issued in 5-UC-264; under that decision, the Day and Night Assistant Superintendents of Operations, Assistant Superintendent of the Machine Shop, Maintenance Foreman, Day and Night Operations Foremen and the Paper Warehouse Foreman were found to be supervisors and therefore excluded from the bargaining unit. The most recent collective-bargaining agreement between the parties became effective on April 22, 1990, and expires on April 30, 1996.

In November 1993, the Employer insisted that supervisors relinquish Union membership. On December 13, 1993, the Union filed a charge against the Employer in Case 5-CA-24100, which alleged that the Employer violated 8(a)(1) and (5) by refusing to bargain with the Union when it required a number of supervisors excluded from the Unit in the 5-UC-264 decision relinquish their union membership. The charge was dismissed on March 29, 1994. The Union appealed the dismissal of that case and the appeal was denied on July 11, 1994.

In April 1994, after dismissal of the charge, Union President Max Keys informed the Employer in writing that:

regarding the possibility of any salaried foremen, assistant foremen or supervisors leaving the Union Bargaining Unit, it is our position that once out of the Bargaining Unit, they cannot do any bargaining unit work. To be more specific, nonunion personnel are not allowed to work on any equipment under Local 31's jurisdiction they are to supervise only.

After this letter, Union officials allegedly told Employer representatives that nonunion foremen and supervisors would not be allowed to direct the work of employees. However, the Employer has not pursued this allegation since the Union has specifically denied making any unlawful statement, and has stated that supervisors **can** direct employees.

On October 5, 1994, the Employer filed the instant charge. On February 7 and March 7, 1995, a hearing was held regarding grievances filed by the Union concerning the issue of supervisors "touching equipment." On August 8, 1995, the arbitrator sustained the grievance. The arbitrator found that the Employer had violated the contract where supervisors in the supervisory positions covered by the UC case performed bargaining unit work in situations other than troubleshooting or operating emergencies. In that arbitration case and in the instant case the Employer asserted that supervisors have historically "touched equipment." However, the arbitrator specifically rejected this argument, and further found that when supervisors in the past have "touched equipment", the Union immediately protested. The arbitrator noted the unfair labor practice charge pending in

the instant case, and stated that "[a]s of the date of this hearing, that ulp charge had not been resolved and remained pending. Both side concede that the NLRB proceeding is separate from this dispute." Arbitration Decision, at p.12.

ACTION

We conclude that the charge should be dismissed, absent withdrawal.

A violation of Section 8(b)(1)(B) requires coercion of an employer in the selection of its "representatives for the purpose of collective bargaining or the adjustment of grievances."[(2)] In construing the "narrow purpose and scope of Section 8(b)(1)(B)," the Supreme Court has defined "Section 8(b)(1)(B) representative" as a far narrower class of individuals than those defined as "supervisors" under the Act:

Section 8(b)(1)(B) covers only individuals selected as the employer's representative 'for the purpose of collective bargaining or the adjustment of grievances' while the total class of supervisors is defined by Section 2(11) to include individuals engaged in a substantially broader range of activities.

Electrical Workers Local 340, 481 U.S. at 586 (1987).

Further, in Electrical Workers Local 340, supra, the Court construed its earlier decision in American Broadcasting Co. v. Writers Guild, 437 U.S. 411 (19780, as holding that a prerequisite to the finding of an 8(b)(1)(B) violation is "a factual finding that a union's sanction will adversely affect the employer's representative's performance of collective-bargaining or grievance-adjusting duties." 481 U.S at 585, cited in Sheet Metal Workers Local 68 (DEMOSS), 298 NLRB 1000, 1005 (1990).

In Florida Power,[(3)] the Supreme Court created a restrictive "adverse-effect" test to determine when a union's discipline of a supervisor-member constitutes a violation of Section 8(b)(1)(B):

only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainor on behalf of the employer. 417 U.S. at 804-805.

In ABC[(4)] the Court further explained that:

...union pressure on supervisors can affect either their willingness to serve as grievance adjusters or collective bargainors, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative.

And in NLRB v. Electrical Workers, IBEW Local 340, supra, the Court stated that its language implicitly limited the application of the "adverse-effect" test:

an adverse effect on future Section 8(b)(1)(B) activities exists only when an employer-representative is disciplined for behavior that occurs while he or she is engaged in Section 8(b)(1)(B) duties--that is, "collective bargaining or grievance adjustment, or...any activities related thereto." 125 LRRM at 2308.

The Court added that the assumption underpinning Florida Power, supra, and ABC, supra, was

...that an adverse effect can occur simply by virtue of the fact that an employer-representative is disciplined for behavior that occurs during the performance of [Section] 8(b)(1)(B) tasks...125 LRRM at 2311.

In the instant case, there is no evidence that the Union restrained or coerced any employer representative within the meaning of Section 8(b)(1)(B). The only thing the Union did was to protest, through grievance filing, the supervisors "touching equipment" used by bargaining unit employees. In fact, as found by the arbitrator, the Union had a contractual right to demand that only unit employees perform unit work or "touch equipment" used exclusively by unit employees, except when supervisors are troubleshooting or "touching equipment" in operating emergencies. Further, supervisors' "touching equipment"

is not activity related to collective-bargaining, grievance adjustment or contract interpretation, traditional 8(b)(1)(B) duties. And, there is no evidence that the Union has in any other way interfered with supervisors, who are not union members, acting in their "employer representative" capacity. Thus, assuming arguendo that the supervisors in issue herein are indeed Section 8 (b)(1)(B) representatives, there is no evidence of the requisite restraint or coercion.

In these circumstances, we conclude that the charge should be dismissed, absent withdrawal.

B.J.K.

---

[1] The Region notes that it is assuming that the supervisors are Section 8(b)(1)(B) in light of its recommendation to dismiss the charge. However, no specific finding has been made in this regard.

[2] NLRB v. Electrical Workers Local 340, 481 U.S. 573.

[3] Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790, 86 LRRM 2689 (1974).

[4] ABC v. Writers Guild, 437 U.S. 411, 98 LRRM 2705, 2714 (1978).